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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. 230

SWIFT & COMPANY PACKERS, *et al.*,

Petitioners and Appellants Below,

—against—

COMPANIA COLOMBIANA DEL CARIBE, S. A.,

Respondent and Appellee Below.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

GEORGE C. SPRAGUE,
Proctor for Respondent.

NICHOLAS J. HEALY, 3RD,
Of Counsel.

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Statement of the Case

The order here involved was one made *pendente lite* by the District Court for the Canal Zone, in a cause of suit in admiralty for cargo damage against a carrier *in personam*. The order vacated the attachment of a vessel, alleged to have been the property of the carrier respondent, which had been levied upon pursuant to a writ of foreign attachment issued under the permissions of General Admiralty Rule No. 2. The moving party and respondent here (not the carrier) was the claimant of the attached vessel,

and was also named as a respondent in an amended and supplemental libel after the initial seizure was made.

The affreightment was entirely foreign to the citizenship and commerce of the United States. The libels allege that one Noboa, a Colombian citizen, at Guayaquil, Ecuador, shipped about 30,000 bags of rice with Cia. Transmaritima Colombiana, S. A., a Colombian corporation, owner of the motorship CALI, a Colombian flag vessel, for delivery to his order in Cuban ports. The CALI lifted the shipment, issued her order bills of lading to Noboa and sailed on her voyage. En route, she sprang a leak, and, in sinking condition, was beached at Grand Cayman, where she and a part of the rice became totally lost on January 17, 1948. The petitioners (libelants) are Noboa, the shipper, various Cuban nationals and Swift and Company Packers, the latter alleged to be a Nevada corporation. The Cuban libelants and Swift are alleged to have "become the owners" of various parcels of the rice, and, of course, derived whatever rights they had by assignment or transfer from Noboa.

At the time of the affreightment the carrier, Cia. Transmaritima, also owned and operated the Colombian flag steamship ALACRAN (now CARIBE). This vessel, which had nothing to do with the movement of the rice, continued to operate under the ownership and management of the carrier for approximately six weeks after known loss of the CALI.[1] About February 25, 1948, Cia. Transmaritima sold this ship to a newly incorporated Colombian corporation, Cia. Colombiana del Caribe, S. A., the respondent here.[2] The bill of sale was openly recorded in Colombia, and on March 4, 1948 the ALACRAN having then arrived at Barranquilla, Colombia, on a voyage from Cuba, the

1 Her movements are given in detail at R. 98.

2 We shall hereinafter call this respondent "Cia. Caribe" and the carrier respondent "Cia. Transmaritima".

transaction was consummated by the delivery of the ship to Cia. Caribe. At the same time her name was officially changed from ALACRAN to CARIBE, her former registration was cancelled and a new certificate of registry was issued under her new name and ownership (R. 59-61, 94, 108, 195). Thereafter, operated by Cia. Caribe, she loaded cargo for Pacific ports and sailed for Cristobal, where she arrived and started her transit of the Canal on March 8th. As she passed through the Atlantic locks she was seized by the Marshal under the process issued in this cause (R. 18-9, 98).

On Sunday, March 7, the Canal Zone District Judge being absent in the United States, the original libel was filed. It is the conventional admiralty libel *in personam* for cargo damage. It names the carrier Cia. Transmaritima as the sole respondent and prays that if that respondent cannot be found within the District, its goods, etc., "in particular a certain vessel known as the ALACRAN or the CARIBE" be attached by process of foreign attachment (R. 3-14). On the same day, process *in personam* with clause of foreign attachment was issued by the Clerk, and the Marshal, evidently without any attempt to find and serve Cia. Transmaritima, boarded the CARIBE and took her into custody (R. 16-9, 105).

A few hours later on the same day the amended and supplemental libel was filed, which joined Cia. Caribe as a respondent, reiterated the allegations of the original libel and added the matter in Pars. II, III and IV (R. 23-8). The essence of the addition is that since the filing of the original libel, the libelants learned of the sale and transfer of the ship to Cia. Caribe; that the latter is the "alter ego" of Cia. Transmaritima and that the sale was fraudulent, fictitious and designed to defraud the libelants. It alleges alternatively that Cia. Caribe is indebted to Cia. Transmaritima for the purchase price of the vessel. Attachment

of the CARIBE was prayed as being the property of both respondents. New process was issued and the Marshal made a second seizure of the CARIBE (R. 31-3), which still remains in his custody. The Marshal made no personal service on either respondent, nor did he seek to find either of them (R. 32-3, 193).

Due to the Judge's absence, Cia. Caribe was unable to seek summary relief. On March 15, the CARIBE's master filed his verified claim to the vessel, asserting sole ownership of Cia. Caribe and his lawful possession as its bailee (R. 36-7). Both respondents appeared specially and Cia. Caribe moved to vacate the attachment (R. 39-41). The papers were sent to the incumbent Judge, Hon. Bunk Gardner, then in Kentucky (R. 71). On March 31, Judge Gardner overruled the motion, stating his conclusion that it "cannot be sustained at this time and on this showing," and that the overruling was "without prejudice to the respondents filing any further motions that they may desire to file" (R. 70-2). On the following day Judge Gardner resigned his office and the District was without a Judge for several months thereafter (R. 194).

Cia. Transmaritima then appeared generally and answered the libels on the merits (R. 74-81). Cia. Caribe also answered, reasserting its ownership and possession of the vessel at and prior to the institution of the proceeding and denying any connection with the affreightment and loss on the CALI (R. 82-5).

On August 16, just after the new Judge, Hon. Joseph J. Hancock, had assumed his duties, Cia. Caribe, on the papers on file and a detailed factual affidavit by one of its proctors (R. 93-102), moved to vacate the attachment of the CARIBE and dismiss the amended and supplemental libel as to it (R. 89-92). When the motion was heard (August 30th), the libelants offered no proofs whatsoever that the CARIBE was the property of Cia. Transmaritima, the carrier, nor

did it object to or offer any contradiction of the proofs submitted by Cia. Caribe (R. 160, 194, 197, 224). Indeed, counsel conceded that, prior to suit and levy, Cia. Caribe had legal title to the ship. Their position was that they were entitled, despite Cia. Caribe's motion and proofs, to hold the vessel under attachment upon the bare allegations of their amended and supplemental libel.

After full consideration, Judge Hancock granted the motion to the extent of ordering the attachment of the CARIBE vacated and the vessel released (Opn., R. 104-13). He held, however, that the attachment was good as to certain parts and strippings of the wrecked CALI which were on board the CARIBE[3] and that Cia. Caribe, as garnishee, should be required to answer in due course as to any property, debts and credits belonging to the carrier, Cia. Transmaritima, in its possession or control at the time of the seizure (R. 112).

The libelants sought a rehearing, which was denied (R. 157-66) and a formal order for the release of the vessel was entered (R. 167-70). Giving a bond to maintain the vessel in custody, the libelants appealed to the Court of Appeals for the Fifth Circuit, which affirmed the order (R. 206-7) and denied a petition for rehearing (R. 228). One judge dissented in each instance.

The Proofs, Issues and Decisions

Cia. Caribe made proof of its title, possession and operation of the ship attached, together with proof tending to negative the allegations that the transfer was fraudulent. Its motion to discharge the attachment was a summary proceeding in accordance with conventional admiralty prac-

3 The CARIBE had picked up these strippings at Grand Cayman while en route to Cuba. See R. 98.

tice to determine issues of fact and law bearing on the right and validity of an attachment.

The libels, in so far as Cia. Transmaritima is concerned, allege a valid maritime cause of suit *in personam* on the theory of carrier's liability. As to Cia. Caribe, they allege no such thing. No claims whatever were asserted against Cia. Caribe based on the affreightment or loss. On any possible theory of the case, the ship was only subject to attachment if she was the legal property of Cia. Transmaritima, or if that Company still retained some equitable ownership in her sufficient to enable the physical ship to be attached as its property.[4] Cia. Caribe had possession, control and apparent title, with every presumption of fact, as against the libelants, that the title was untainted and *bona fide*.

The libelants were thus challenged by the motion to show some justification for the attachment of Cia. Caribe's ship, and were required to make at least a *prima facie* showing that she belonged to Cia. Transmaritima in fact or that that Company had some beneficial interest in her to justify her being held as its property. Without such showing, the petitioners stood convicted of having attached the property of one person for the alleged debt of another. The right of attachment, thus challenged, was essentially a question of fact.

The petitioners offered no proofs whatsoever. Not a shred of evidence in any form was offered to deny or contradict Cia. Caribe's title, possession or control, to show any existing property interest in Cia. Transmaritima, legal or equitable, to prove any of the allegations of fraud or to suggest any inference of fraud or bad faith in the sale transaction.

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4 The latter assumption is argumentative. We have never heard of an admiralty attachment of an *equity* in a ship or of the attachment of a ship because of "equities" existing in a respondent who did not have legal ownership.

Cia. Caribe's proofs were left undenied and uncontradicted on every aspect. In short, the petitioners defaulted all factual issues and chose to stand on the proposition that they were entitled to hold the ship under seizure upon the unsupported allegations of their libel, regardless of presumptions and Cia. Caribe's proofs.

The District Court made findings of fact, for the purposes of the summary proceeding (R. 107-9), as to the pleaded facts of the affreightment and to the effect that Cia. Caribe had been incorporated after the loss; that the stockholding and control of the two companies were not identical; that the sale of the ship had been made on February 25; that the name had been changed and the ship officially registered under the ownership of Cia. Caribe on March 4, and that thereafter and until the levy the ship had been operated by Cia. Caribe. These findings were in accordance with Cia. Caribe's proofs. The attachment of the ship was vacated and she was ordered to be released.

The Appellate Court affirmed. It expressed grave doubt that the order was appealable, since it determined no final rights (R. 195-6). It held that no maritime liability was asserted against Cia. Caribe or the ship; that the libel *in personam* against Cia. Transmaritima as carrier was good, as was the garnishment against Cia. Caribe requiring it to answer as to all property or debts of Cia. Transmaritima in its hands (R. 196). On the question of the validity of the attachment, it noticed the undisputed fact of the sale to Cia. Caribe prior to the seizure and the absence of any proof of possession or control by Cia. Transmaritima and held that under such circumstances the burden was surely on the petitioners to show a justification for her seizure (R. 196-7). It held that Cia. Caribe had the right to a prompt inquiry and that Admiralty Rule 23[5] of the District

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5 Text *infra*, p. 16, n. 10.

Court provided for such (R. 196). It decided that Cia. Caribe's proofs were sufficient under the rule to require the petitioners to show some cause why the vessel should be held (R. 197). The essence of the holding was that, despite more than ample opportunity, the petitioners had proved nothing at all to support their allegations that the ship was the property of Cia. Transmaritima or that it had any interest in her, legal or equitable (R. 197).

The balance of the opinion dealt with substantive and jurisdictional questions as to the attempt to involve Cia. Caribe as a respondent (R. 197-8). These points were merely cumulative against the attachment. They were not vital to the order but will be discussed to some extent in the argument.

By necessary implication the Court rejected the petitioners' position that they were entitled to maintain the attachment on the basis of bare allegations of fraud.

ARGUMENT

I

The attachment was primarily vacated for failure of factual proof to support the right to it.

There is no inherent right to an attachment in the admiralty. Under General Admiralty Rule No. 2; nothing may be reached by a writ of foreign attachment which is not the property of a respondent as to whom a valid maritime cause is stated. The writ will only issue on sworn allegations that the property sought to be sequestered is the property of the respondent sued. If alleged ownership is conceded by absence of challenge, a levy may be maintained *pendente lite*, but if the allegations of ownership are disputed, a square issue of *fact* is presented.

That was the case here. The factual issue, in essence, was whether Cia. Transmaritima had any property interest in the attached ship CARIBE. Cia. Caribe, possessor and title holder, offered proofs that Cia. Transmaritima had none. The attaching libelants offered no proofs showing any such interest. The District Court vacated the attachment, primarily upon that account. The Court of Appeals reviewed and affirmed.

The petitioners ask review by this Court, upon asserted important questions of law, ignoring the factual determinations against them by the two Courts below, which are alone sufficient to jusfify the order vacating the attachment.

II.

Petitioners' Points for granting a writ are unsubstantial and rest upon inaccurate statements of fact and law.

The petitioners urge four specific points or questions for the granting of a writ of review by this Court. We answer them, *seriatim*:

Point A. That the Court Declined Jurisdiction of the Suit on the Cargo Claim (Petitioners' Brief, 19-22).

The complete answer to this point is that the District Court did not decline jurisdiction of any aspect of the claim for cargo loss. It expressly retained such jurisdiction and afforded the libelants every incidental remedy to which they were able to establish a right. That is the only answer which can or need be made to Point A.

On the first motion before Judge Gardner, the Court was urged to throw out the whole case as involving exclusively a foreign transaction and foreign contracting parties. We think that motion should have been granted. But it was not granted and as the retention of jurisdiction was clearly a matter of discretion where a maritime cause was stated, that decision was accepted. The question of discretionary jurisdiction over the cargo cause of action was not pressed in the proceedings under examination.

Point B. That the District Judge Was Bound by the "Without Prejudice" Order of His Predecessor (Petitioners' Brief, 22-3).

The first motion presented to Judge Gardner *in absentia* was denied by him "at this time and upon this showing" and "without prejudice to the respondents' filing any fur-

ther motions they may desire to file" (R. 71-2). On the following day, Judge Gardner resigned.

The motion now under examination was presented to the successor judge. While some of the grounds were the same as on the previous motion, other grounds were asserted and augmented proofs were supplied.

The claim that Judge Gardner's order determined conclusively the validity of the attachment or even the matter of jurisdictional discretion seems utterly fantastic. His order did not even purport to do so, being made expressly *without prejudice*. Even had he purported to make a conclusive order on any issue he would have lacked the power. A cause, while *sub judice* in a district court, is under control of the *court*, not of an individual judge. Even a decision or judgment on the merits of a cause may be altered by a successor judge on motion to vacate or for new trial or rehearing.

The petitioners admit that there is no precedent or authority for their astonishing claim (Brief, 23). They cite, by way of purported analogy, two decisions of this Court holding that a discretionary acceptance or declination of jurisdiction by a District *Court* in admiralty is not reviewable *on appeal*.[6] Again we point out that the discretion is that of the District Court, not of any individual judge.

The point is not only unsubstantial but inaccurate, since the Court never declined jurisdiction of the maritime claim.

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[6] *Canada Malting Co. v. Paterson Steamships*, 285 U. S. 413; *Charter Shipping Co. v. Bowring, Jones & Tidy*, 281 U. S. 515.

Point C. That the District Court Denied Jurisdiction to Determine Property Ownership in the Vessel Seized (Petitioners' Brief, 23-5).

Of course the District Court had jurisdiction to adjudicate the issue as to whether the vessel attached was actually the "property of the respondent"! That it exercised its jurisdiction in this regard and determined the issues contrary to the petitioners' allegations is fully apparent from the opinions below.

The questions of jurisdiction, inherent or discretionary, dealt with in those opinions, relate only to the attempt to involve Cia. Caribe as a personal respondent on the allegations that it was a dummy for the carrier corporation or had acquired its ownership of the vessel through fraud. No jurisdictional objections were suggested as preventing a full inquiry as to any attachable interest retained in the carrier corporation. The Court inquired into that and held that none had been shown.

But the amended and supplemental libel sought also to hold Cia. Caribe as a personal respondent, to subject *it* to personal liability on the cargo claim and to sequester the ship as security for a personal judgment against it.

Quite aside from any question of the right to maintain an attachment, in which factual, procedural and equitable considerations were involved, it is obvious that if the libel or complaint failed to state a jurisdictional cause of action against Cia. Caribe, the whole case against it failed and all possible ancillary rights failed with it. Our motion challenged the jurisdiction of the District Court, as a court of admiralty, over the cause of suit tendered against Cia. Caribe and sought dismissal of the amended and supplemental libel as to it. Alternatively, we moved that, if the Court should hold that it had jurisdiction of the subject matter, it be declined on discretionary grounds. These

points in no way involved the maritime claim against the carrier nor would they have defeated the levy upon the ship if it could have been shown that the carrier had any attachable interest in her.

Without extended discussion, we offer these points and authorities in support of the jurisdictional position taken by the District Court as to the alleged cause of action against Cia. Caribe:

1. The jurisdiction of admiralty is limited to maritime causes of suit. That limitation is inherent. Admiralty courts proceed upon equitable principles, but they do not have the characteristic powers of a court of equity. They cannot entertain a bill for specific performance or to correct a mistake *or declare or enforce a trust or an equitable title,* or exercise jurisdiction in matters of account. *The Eclipse,* 135 U. S. 599, 608.

2. A non-maritime issue does not become maritime by being asserted with or as an incident to a maritime cause. The Court, retaining the maritime issue, will sever and dismiss the non-maritime issue. *The Ada,* C. A. 2, 250 Fed. 194.

3. The aspect of the amended and supplemental libel which seeks to attack the sale is patently and wholly non-maritime. It has the typical characteristics of a creditor's bill in equity to trace and apply assets of an alleged debtor in the hands of a third party. Such a subject matter is not of admiralty cognizance and such relief cannot be granted in an admiralty suit. *Yone Suzuki* v. *Central Argentine Ry. Co.,* C. A. 2, 27 F. 2d 795, cert. den., 278 U. S. 652. See also the District Court opinion in the same case, 19 F. 2d 645, 653, 1927 A. M. C. 678, 692.[7] The same

[7] This passage in the Federal Report was garbled by the printer.

rule was applied in *The Melmay*, D. C. Z., 1932 A. M. C. 1396,[8] where a ship, alleged to belong equitably to a maritime respondent, was attached. Application of the principles of the *Yone Suzuki* case resulted in vacating the attachment.

4. Cases in which a libelant seeks to reach and apply assets in the hands of a third party are to be distinguished from the "dummy" cases, where the real party contracts or acts in the name of another or "alter ego." Admiralty may then proceed against the ~~real~~ obligated party since he is the real maritime debtor. Cases of the latter character are *Gardner* v. *Dantzler Lumber Co.*, C. A. 5, 98 F. 2d 478, and *Luckenbach S. S. Co.* v. *W. R. Grace & Co.*, C. A. 4, 267 Fed. 676. Cia. Transmaritima used no "dummy" in the affreightment transaction and Cia. Caribe could not have been a dummy as it was not then in existence.

5. *Lee* v. *Thompson*, C. C. La., F. Cas. No. 8,202, involved a proceeding to trace property in aid of a writ of execution in an admiralty cause, liability upon the maritime cause of action having been adjudicated. The inquiry was had under the state practice under the express permissions of Gen. Adm. Rule 20. No such proceeding exists in aid of an admiralty attachment and state practices are inapplicable. The Court of Appeals held that if the petitioners should obtain a judgment against the carrier herein, the present holdings were without prejudice to any rights they might then have to enforce it (R. 198).

6. The foregoing paragraphs deal with lack of jurisdiction as to subject matter. Even if such jurisdiction existed, it is elementary that the District Court had power to decline jurisdiction at its discretion since, the transaction

8 Not reported in "Federal".

and suitors were foreign. The petitioners do not dispute the generality of this rule but think it inapplicable because of the presence, as a libelant, of Swift & Company Packers, allegedly a citizen of Nevada. But Swift's rights, if any, could only derive by assignment from Noboa, the foreign shipper. It was not a party to the affreightment and only appears on two of the CALI's bills of lading as a name with a Cuban address, to be *notified* upon the arrival of the shipment (R. 50-5). Where a citizen libelant asserts rights derived by assignment or subrogation from a foreign shipper, his rights are no greater than those of the person from whom he receives them, and the Court may nevertheless decline jurisdiction at discretion. *The Tricolor,* S. D. N. Y. 1 F. Supp. 934, aff'd. C. A. 2, 65 F. 2d 392; *Whittig* v. *Canada S. S. Lines,* W. D. N. Y., 59 F. 2d 428; *Insurance Co. of North America* v. *British India Co.,* E. D. La., 38 F. Supp. 47; *La Societe du Gaz v. Armateura Francais,* House of Lords, 23 Lloyds List L. R. 209.

These jurisdictional considerations merely cumulate justification for the discharge of the attachment; they do not underlie it. The libelant Swift and all the others are still in court on their maritime claim and have been protected in all valid rights of attachment and garnishment to which their process and showing entitled them.

Point D. That the Right to Attachment Is Not Triable upon Affidavit and Documentary Proof as to Facts (Petitioners' Brief, 26-9).

The *merits* of the cargo suit do not remotely involve any question as to the ownership of the CARIBE. That is only involved in a consideration of the petitioners' right to have attachment of her, *pendente lite,* and, conventionally, factual issues as to any such ancillary right are tried summarily on affidavits and other documentary proofs. Compare the

procedure to obtain an injunction *pendente lite* or sequestration of property by receivership in equity. Admiralty has ever followed the practice of summary proceedings to determine the validity of an attachment or arrest and proofs are usually in affidavit and exhibit form. Almost invariably these summary matters are brought on by notice and motion to vacate the attachment or by *ex parte* showing and order to show cause. Practically all the maritime districts have a specific rule, more or less identical with Canal Zone Admiralty Rule No. 23,[10] providing for summary disposition of rights in connection with arrests and attachments. The Court of Appeals held that our motion was made under that rule (R. 197, 224).

Where affidavits are competent as evidence, as in a summary proceeding, their weight is for the court, to be evaluated according to the circumstances, one of the most cogent being the weight of proof offered to contradict them. Proof by affidavit which may, on its face, have little probative value, becomes strong, perhaps conclusive, when the opposing party, having opportunity, fails to deny the facts asserted, explain them or offer controverting proof. *Union Bank* v. *Mott*, 9 Abb. Pr. (N. Y.) 106, 109; *Commissioners* v. *Purdy*, 13 Abb. Pr. (N. Y.) 434, 437-8; *National Life Ins. Co.* v. *Brasuell*, 209 Ky. 465, 217 S. W. 413.

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9 *The Heinrich Arp*, D. C. Z., 1930 A. M. C. 1198; *The Melmay*, D. C. Z., 1932 A. M. C. 1396 and 1933 A. M. C. 1057 (neither reported in "Federal"); *The Talmar*, E. D. Pa., 38 F. Supp. 615. For similar practice in law cases see *United States* v. *Specified Quantities of Intoxicating Liquors*, C. A. 2, 7 F. 2d 835, 836; *Skewan* v. *Hallenbach*, S. D. N. Y., 150 Fed. 231; *Birdsall* v. *Germain*, S. D. N. Y., 227 Fed. 953.

10 The Rule, in so far as pertinent to attachment, reads:

> "In case of the attachment of property, * * * any person having a right to intervene in respect of the thing attached, may, upon evidence showing any improper practice or manifest want of equity on the part of the libelant, have an order from the judge requiring the libelant to show cause instanter why the * * * attachment should not be vacated." (See 5 Benedict, Admiralty (6th Ed.) p. 481.)

The proctor's affidavits, particularly the second (R. 93-102) were not "mere denials" of ownership. The facts stated are probative, specific and affirmative and practically every one of them can be readily verified by any party from public records. The affidavits were sufficient to show affirmatively that the ship CARIBE was sold and delivered to Cia. Caribe before the proceedings herein were commenced; that the ownership and control of the two Colombian corporations were not identical and that her movements after the loss of the CALI, while the CARIBE was still owned by Cia. Transmaritima, were not those of a ship whose operator was seeking to evade its debts or withhold its property from the reach of any creditor. These facts were undenied and uncontroverted. Every presumption is that the sale was *bona fide*, absent proof that it was not. No proofs suggesting any taint upon the transaction were offered.[11]

We never claimed that the CARIBE's certificate of registry (R. 59-61) was a document of title or, of itself, probative

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11 The attention of the Court may be caught by the petitioners' partial quotation from a paragraph of the dissenting opinion below, at Brief 28, n. 24. See R. 204-5. The dissenting judge referred to the matter appearing at R. 121-156. This material was not *evidence* nor was it offered or received as such. It got into the record because at the time the petitioners filed their *closing* brief on their motion for rehearing in the District Court, they arbitrarily filed it with the Clerk. No leave of court was obtained. After the rehearing was denied, the petitioners included this material in their praecipe for the record for appeal (Items 26 and 27, R. 188) and we noted our objection in our cross praecipe (R. 190). It is not a legitimate part of the record.

Substantively, the material has nothing whatsoever to do with the ownership of the CARIBE. It consists of purported transcripts of answers to interrogatories and oral testimony given by garnishees in proceedings had in New York and Texas by these petitioners. Evidently the petitioners were endeavoring to run garnishments on the proceeds of an insurance policy which one Keene, a large stockholder of Cia. Transmaritima, carried in connection with the ship CALI. As a stockholder of the owning corporation, Keene would have a valid insurable interest in its property.

of ownership. It merely confirms the fact of registry in Cia. Caribe's ownership, that the transaction was openly and publicly accomplished and that the document of sale was publicly recorded.

The petitioners' case can derive no strength from the allegations of fraud in their libel. Pleadings are not evidence, either in a summary proceeding or on issues of merit. In *The Navemar*, 303 U. S. 68, 75, this Court said of a verified suggestion claiming possession of a vessel on behalf of the Spanish Ambassador as an intervening suitor:

> "But the filed suggestion, though sufficient as a statement of the contentions made, was not proof of its allegations."

But to give the petitioners the most favorable position possible, let us assume that the allegations of the amended and supplemental libel have the probative force of an affidavit. The verification is upon information and belief by a proctor residing in the Canal Zone. It alleges in substance that in a period of a few hours, the libelants "learned" of the sale of the ship in Colombia between two Colombian corporations and, with a wealth of conclusion, asserts that the intentions were fraudulent and the consideration fictitious or inadequate. That, as a statement of a contention, is one thing. As proof of the *facts*, it is nothing. It would seem apparent to any realist that the only *fact* which the verifier learned was the fact that a sale had been made. No basis for the rest of the allegations is inferable but in the imagination and hopes of the pleader.

Even if the allegations of the libel could be taken as evidence in support of the attachment, their *weight* as against the proofs of Cia. Caribe was for the Court to determine. The burden in the summary proceeding was on the peti-

tioners to justify their levy, as the Court of Appeals held[12] (R. 196).

In support of their point that the facts underlying the right to attach are not issuable summarily or on affidavit proof, the petitioners purport to see a conflict between the decision of the Fifth Circuit Court herein and the decision of the Ninth Circuit Court in *The Celtic Monarch*, 138 Fed. 711. There is no conflict, for the latter case dealt with the *merits* of a maritime cause *in rem*. The libel charged tortious participation in a collision by a tug and its tow, separately owned. The claimant of the tow filed affidavits denying tortious participation by the tow and moved to dismiss as to it. The Court held that as the negligence of the tow was a direct issue on the merits of the cause, it could not be determined summarily or on affidavit proof. Undoubtedly the decision was correct, but the instant case rests on very different considerations. The right to an attachment does not go to the merits.

Much of the difficulty of the petitioners in this case results from their apparent unwillingness to distinguish between a direct cause of suit *in rem* against a ship and the incidental right to attach a ship as the property of an *in personam* respondent. The petitioners have always argued their case as though, upon the occurrence of the loss, those interested in the CALI's cargo acquired some vested right to apply the uninvolved CARIBE in settlement of their claims. This same fallacy, we think, also underlies the views of the dissenting judge in the Court of Appeals. Much

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12 The petitioners evidently assume that the burden was on Cia. Caribe to prove an unassailable title in itself in order to defeat the attachment. They ignore the fact that the ship was seized while in Cia. Caribe's exclusive possession and control so, without affirmative proof, there would not be the smallest presumption that anyone else had any interest in her. The ultimate burden of showing an attachable interest is obviously upon the party who asserts the right.

stress is placed on those views. With all respect, we suggest that the dissenting opinions make assumptions and draw conclusions not supported by the record and, on several points, contrary to it. The idea seems to be inherent that admiralty attachment is a matter of basic right and that fraud and invalidity are to be assumed upon bare assertion. Since the case is not here on the merits, we shall presently spare the Court from a detailed criticism.

We cannot see in the case any questions of law of any public significance. Primarily the petitioners' rights, if any, rested upon facts which they alleged but could not prove. Two courts have held that they did not prove them.

Such points of law as were decided seem to have followed well established principles; the practices adopted and approved were conventional and the decisions are just.

The errors and novelties and the questions of great import which the petitioners claim they see in the decisions seem to be due to their own confusion as to what the issues were and what the courts below did or did not determine.

CONCLUSION

There was no substantial error in the proceedings below and no sufficient grounds for a further review have been shown. The petition should be denied.

Respectfully submitted,

GEORGE C. SPRAGUE,
Proctor for Respondent.

NICHOLAS J. HEALY, 3RD,
Of Counsel.